Supreme Court, U.S.
FILED

JAN 9 2003

OFFICE OF THE CLERK

(11)

No. 02-311

IN THE
Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
Lawrence J. Fox
David J. Kessler
D. Alicia Hickok
Noreen P. Alvarado
Emily L. Mirsky
Robin M. Maher

ALFRED P. CARLTON
Counsel of Record
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Counsel for Amicus Curiae *the American Bar Association*

ST IVES BURRUPS/APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

49 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE GUARANTEES OF THE SIXTH AND EIGHTH AMENDMENTS REQUIRE REASONABLE INVESTIGATION OF MITIGATION EVIDENCE	5
A. The Sixth Amendment Requires Reasonable Investigation.	5
B. The Eighth Amendment Provides the Right to Present Mitigation Evidence for Use by the Capital Sentencer	7
C. The Guarantees of the Sixth and Eighth Amendments Cannot be Satisfied Without Reasonable Investigation of Mitigation Evidence.	10
II. TO BE REASONABLE, AN INVESTIGATION OF MITIGATION EVIDENCE SHOULD BE COMPLETE AND THOROUGH	13
A. A Reasonable Mitigation Investigation Is Complete.	14
B. A Reasonable Mitigation Investigation Is Thorough	15
C. A Complete and Thorough Mitigation Investigation Is Conducted by Counsel Independently and With the Assistance of Experts.	18
1. Counsel Should Conduct the Mitigation Investigation Independently.	18

TABLE OF CONTENTS

	Page
2. Counsel Should Conduct the Mitigation Investigation with the Assistance of Experts.	20
III. COUNSEL HAS AN ETHICAL OBLIGATION TO CONDUCT A REASONABLE INVESTIGATION INTO MITIGATION EVIDENCE..	21
CONCLUSION	24
APPENDIX: GUIDELINE 11.3 – DETERMINING THAT DEATH PENALTY IS BEING SOUGHT	A2
APPENDIX: GUIDELINE 11.4.1 – INVESTIGATION	A4
APPENDIX: GUIDELINE 11.8.3 – PREPARATION FOR THE SENTENCING PHASE	A11
APPENDIX: GUIDELINE 11.8.5 – THE PROSECUTOR'S CASE AT THE SENTENCING PHASE .	A13
APPENDIX: GUIDELINE 11.8.6 – THE DEFENSE CASE AT THE SENTENCING PHASE	A14

TABLE OF AUTHORITIES

CASES	Page
Ake v. Oklahoma, 470 U.S. 68 (1985)	20
Atkins v. Virginia, 536 U.S. 304 (2002)	19
Attorney Grievance Comm'n v. Zdravkovich, 762 A.2d 950 (Md. 2000)	22
Austin v. Bell, 126 F.3d 843 (6th Cir. 1997)	12
Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001)	12
Bell v. Cone, 535 U.S. 685 (2002)	17
Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).	18
Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002) . . 11,	12
Burger v. Kemp, 483 U.S. 776 (1987)	17
Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002), *cert. denied*, 122 S. Ct. 2645 (2002)	12
Carter v. Bell, 218 F.3d 581 (6th Cir. 2000).	18
Clemons v. Mississippi, 494 U.S. 738 (1990)	10
Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002)	12
Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971)	19
Darden v. Wainwright, 477 U.S. 168 (1986)	17
Eddings v. Oklahoma, 455 U.S. 104 (1982).	9
Gideon v. Wainwright, 372 U.S. 335 (1963).	5
Gregg v. Georgia, 428 U.S. 153 (1976).	7
Hitchcock v. Dugger, 481 U.S. 393 (1987)	9
Holloway v. Arkansas, 435 U.S. 475 (1978)	6
Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)	7
Hull v. Freeman, 932 F.2d 159 (3d Cir. 1991)	20
Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001).	12

	Page
Jurek v. Texas, 428 U.S. 262 (1976)	7
Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002), *cross-petitions for cert. filed* (Sept. 18, 2002) (No. 02-434); (Sept. 10, 2002) (No. 02-6265)	17
Kimmelman v. Morrison, 477 U.S. 365 (1986)	6, 7
Lockett v. Ohio, 438 U.S. 586 (1978)	9
Lowenfield v. Phelps, 484 U.S. 231 (1988)	10
Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002)	13
Mills v. Maryland, 486 U.S. 367 (1988)	9
Penry v. Johnson, 532 U.S. 782 (2001)	9
Penry v. Lynaugh, 492 U.S. 302 (1989)	14
People v. Bell, 505 N.E.2d 365 (Ill. App. 1987)	21
Proffitt v. Florida, 428 U.S. 242 (1976)	7
Richmond v. Lewis, 506 U.S. 40 (1992)	10
[Stanislaus] Roberts v. Louisiana, 428 U.S. 325 (1976)	7
Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002)	17
Skipper v. South Carolina, 476 U.S. 1 (1986)	9, 14
State ex. rel. Deeb v. Campbell, 167 S. 805 (Fla. 1936)	19
Strickland v. Washington, 466 U.S. 668 (1984)	5, 22
Sumner v. Shuman, 483 U.S. 66 (1987)	8
[Terry] Williams v. Taylor, 529 U.S. 362 (2000)	*passim*
Voyles v. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980)	12
Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987)	22
Woodson v. North Carolina, 428 U.S. 280 (1976)	7, 8

	Page
AMERICAN BAR ASSOCIATION MATERIALS	
ABA Death Penalty Guidelines, Guideline 11.4.1	*passim*
ABA Death Penalty Guidelines, Guideline 11.8.3	10
ABA Death Penalty Guidelines, Guideline 11.8.5	10
ABA Death Penalty Guidelines, Guideline 11.8.6	10, 20
ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989)	2
ABA Prosecution Function and Defense Function Standards, Standard 4-4.1	13
ABA Prosecution Function and Defense Function Standards, Standard 4-4.1(a)	15
ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. (3d ed. 1992)	2
ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993)	3
American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990)	2
Model Rules of Prof'l Conduct R. 1.1 (2002)	21, 22
Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002)	22
Model Rules of Prof'l Conduct R. 1.2 cmt. 1 (2002)	23
Model Rules of Prof'l Conduct R. 1.3 (2002)	21, 22
Model Rules of Prof'l Conduct R. 1.4 (2002)	22

Page

Model Rules of Prof'l Conduct R. 1.4 cmt. 5 (2002) . . 23

Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) 21

RULES AND LEGISLATIVE MATERIALS

Sup. Ct. R. 37.6 1

MISCELLANEOUS

Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493 (2002) 21

Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characterisitcs of 15 Death Row Inmates in the United States*, 143:7 Am. J. Psychiatry 838 (1986). 19

4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §30.27 (5th ed. 2000) 22

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995). 19

James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985) 19

Restatement (Second) of Torts § 299A 22

Restatement (Third) of the Law Governing Lawyers § 16 cmt. d (2000) 22

Restatement (Third) of the Law Governing Lawyers § 52 cmt. b (2000) 22

Page

Restatement (Third) of the Law Governing Lawyers § 52 cmt. c (2000). 22

Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323 (1993) 19

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, establishing the foundation for a lawyer's obligations to his client in all representations. In 1908 the ABA adopted the original Canons of Professional Ethics and in 1913 the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA adopted the Model Code of Professional Responsibility that was subsequently adopted by the vast majority of state and federal jurisdictions. In 1983, the ABA drafted the Model Rules of Professional Conduct. All but seven jurisdictions adopted the Model Rules. Finally,

---

1. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

building on the work of its "Ethics 2000" Commission, the ABA adopted amendments to the Model Rules in February of 2002.

The ABA takes no position on the death penalty as a general matter. However, the ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. The ABA is especially concerned about the effective representation of criminal defendants who might be or have been sentenced to death.[2] One of the several ABA entities that focus on legal issues related to capital punishment is the Special Committee on Death Penalty Representation, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines"; see* App. A1 – A17) which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the *minimal resources and practices necessary to provide effective assistance of counsel.*" ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (emphasis supplied); *see also* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) *("ABA Providing Defense Services Standards")* ("These guidelines are incorporated by

2. *See, e.g.*, ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 11 (3d ed. 1992) (*"ABA Providing Defense Services Standards"*) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (*"ABA Death Penalty Guidelines"*); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 13 (1990).

reference into the [*ABA Providing Defense Services Standards*]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) (*"ABA Prosecution Function and Defense Function Standards"*) ("Defense counsel should comply with the [*ABA Death Penalty Guidelines*]."). The Guidelines were based on the experiences of those who handled post-conviction cases on collateral review and the lessons learned from the pattern of inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. The ABA called upon each death penalty jurisdiction to adopt the *ABA Death Penalty Guidelines*.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough investigation. Such an investigation is necessary with respect to all matters lawyers handle for their clients, but never more so than when lawyers and their clients must be properly informed with regard to the many choices that must be made concerning the guilt/innocence phase and the penalty phase of a capital trial. Decision-makers cannot act reasonably if they lack an informed basis for choosing one defense over another, one expert over none, or the presentation of some facts over others.

In a capital case, effective representation includes a *complete* investigation into all areas from which a reasonable attorney would develop mitigation evidence including, but not limited to, a client's cognitive and neurological condition and history; his family, friends and associates; school, employment and military records; medical history; and incarceration and corrections records, as well as other areas on which counsel is put on notice because of the

3. *See id.*

particular facts in the case. A reasonably conscientious investigation into each of those areas is also *thorough*.

Without such an investigation, counsel and client cannot effectively choose what, if any, mitigation evidence to present at trial because they will not know the likely benefits and costs of presenting it. The scope of pre-trial *investigation* is necessarily independent from the scope of trial *presentation*; a decision not to present evidence requires the same knowledge of that evidence and its implications as a decision to present the evidence. By conducting a complete and thorough pre-trial investigation into mitigation evidence, counsel protects the adversarial nature of the justice system and helps ensure that an individualized determination regarding the appropriateness of the death penalty will be made for the defendant.

The ABA respectfully submits that the *ABA Death Penalty Guidelines* represent a consensus within the profession regarding principles to guide capital defense counsel on the subject of mitigation evidence and the necessity of investigating the same. Long prior to the trial this Court now considers, the ABA informed the legal profession, through the *Guidelines*, about the scope of potentially mitigating evidence that could be available and warned lawyers against incomplete investigations. The *Guidelines* reflect the insight of practitioners with years of experience and the instruction of relevant case law and statutory provisions. The standard of care set forth in the *Guidelines* resulted from the ABA's study of what reasonably performing lawyers were doing and what ineffectively performing lawyers were not doing. The *Guidelines* are proffered to the Court, not as a substitute for counsel's own determination of the necessary scope of investigation presented by the unique character and background of his client, but rather as an essential starting point from which counsel should develop the individualized research necessary to humanize the client.

ARGUMENT

I. THE GUARANTEES OF THE SIXTH AND EIGHTH AMENDMENTS REQUIRE REASONABLE INVESTIGATION OF MITIGATION EVIDENCE.

A. The Sixth Amendment Requires Reasonable Investigation.

The right to effective counsel, which derives from the right to counsel, guarantees a defendant the assistance "necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). As the Court made clear in *Strickland*, either the Government or defense counsel may be responsible for depriving the accused of the benefit of counsel. 466 U.S. at 686. Thus, either governmental stumbling blocks or defense counsel's ineptitude may undermine defense counsel's ability to make strategic and tactical decisions in an independent manner. *See id.* at 686, 689.

As identified by this Court, the basic duties of an effective lawyer are loyalty, avoidance of conflicts of interest, advocacy (described as the overarching duty), and consultation and communication with the client; "[c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

The *Strickland* presumption of effective representation[4] is premised upon a lawyer's strategic decision-making

4. Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. 668 at 689. Thus, lawyers are presumed effective unless the defendant can show that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687, and also that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

to promote his client's best interest. This presumption fails, however, if any of the assumptions underlying it fail. For example, if a lawyer is burdened by a conflict of interest, the Court can no longer assume that a lawyer is acting in the best interests of his client. *See Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978). And, as demonstrated in *Kimmelman v. Morrison,* 477 U.S. 365 (1986), a decision can be unreasonable because it is uninformed:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. . . . The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pre-trial preparation puts at risk both the defendant's right to an " 'ample opportunity to meet the case of the prosecution,' " and the reliability of the adversarial testing process.

Id. at 385 (citations omitted).

For the *Strickland* presumption to stand, a lawyer's decisions must be formulated from a reasonable understanding of the law and the facts. *See id.* As with all obligations, the duty to investigate reasonably is not an independent good; rather, it is a means of ensuring that the adversarial process functions properly and that counsel's decisions are reasonable, tactical, and strategic. As a result, if lawyers' decisions are based on ignorance, they are neither reasonable nor strategic. *See, e.g., Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). If lawyers have not conducted a reasonable investigation, they do not have a reasonable understanding of the facts; consequently, they have nothing to which to apply their legal skill and judgment.

The *ABA Death Penalty Guidelines* reflect the professional norms in this area. They state that counsel should "conduct independent investigations . . . immediately upon counsel's entry into the case" and pursue them expeditiously. *See ABA Death Penalty Guidelines,* Guideline 11.4.1 ("Investigation") and cmt. ("Without investigation, counsel's evaluation and advice amount to little more than a guess.").

B. The Eighth Amendment Provides the Right to Present Mitigation Evidence for Use by the Capital Sentencer.

In 1976, this Court issued five decisions evaluating the constitutionality of death penalty statutes enacted by the states: three upholding the statutes, *Gregg v. Georgia,* 428 U.S. 153, 197, 206 (1976), *Proffitt v. Florida,* 428 U.S. 242, 251-52 (1976), *Jurek v. Texas,* 428 U.S. 262, 270-71 (1976), and two striking down the statutes as constitutionally infirm: *Woodson v. North Carolina,* 428 U.S. 280, 303-05 (1976), [*Stanislaus*] *Roberts v. Louisiana,* 428 U.S. 325, 333-34 (1976). Ten years later, this Court summarized the salient distinction between laws that satisfied constitutional mandates and those that did not:

> In the three cases upholding the guided-discretion statutes, the opinions emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual. . . . In the two cases striking down as unconstitutional mandatory capital-sentencing statutes, *the opinions stressed that one of the fatal flaws in those sentencing procedures was their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority.*

Sumner v. Shuman, 483 U.S. 66, 74 (1987) (emphasis supplied). In *Shuman*, while holding unconstitutional a Nevada statute mandating a capital sentence to any life-term inmate convicted of murder, this Court focused on the unique nature of mitigating evidence and the constitutional indispensability of access to that evidence.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 74-75 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

This principle has guided this Court in every evaluation it has made of the constitutionality of a state's sentencing scheme. Indeed, the line of cases culminating in *Mills v. Maryland*, 486 U.S. 367 (1988),[5] held that jury instructions could not serve to preclude jurors from considering mitigating evidence.

Moreover, this Court has made it clear that it is not enough for a defendant to be allowed to develop mitigating evidence. It is not even enough for a jury to be allowed to hear about and consider mitigating evidence. The sentencer must be in a position to *use* the mitigating evidence when deciding whether or not to impose the death sentence. As the Court explained:

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence." For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."

Penry v. Johnson, 532 U.S. 782, 797 (2001) (internal citations omitted) (emphasis in original).

---

5. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (concluding that it was well established that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.") (citations omitted); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Likewise, if an aggravating circumstance – which constitutionally must serve to narrow the class of defendants who are death-eligible (*see, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)) – is found to be invalid, then, where the capital sentencing scheme is predicated on the weighing of aggravating and mitigating circumstances, there must be an actual reweighing of the remaining aggravating factors against all of the mitigating evidence, effectuating the "new sentencing calculus." *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (reversing); *see also [Terry] Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)).

In recognition of the critical nature of mitigation evidence, the *ABA Death Penalty Guidelines* recommend careful preparation by counsel for the penalty phase through proper investigation, consultation with the client, analysis of the prosecution's case and evaluation of all reasonably available evidence in mitigation. *See ABA Death Penalty Guidelines*, Guideline 11.4.1 ("Investigation"), 11.8.3 ("Preparation for the Sentencing Phase"), 11.8.5 ("The Prosecutor's Case at the Sentencing Phase"), and 11.8.6 ("The Defense Case at the Sentencing Phase").

C. The Guarantees of the Sixth and Eighth Amendments Cannot be Satisfied Without Reasonable Investigation of Mitigation Evidence.

Defense counsel's ineptitude cannot properly be allowed to prevent the sentencer from hearing, considering, and giving full effect to the mitigating evidence that it is the defendant's right to present. If lawyers do not articulate to the client the right to have mitigation evidence considered, the scope of that evidence, and the effect that evidence can have, the lawyers become obstacles to a constitutionally fair sentence. Indeed, the fundamental constitutional right to present "humanizing" information rings hollow unless defense counsel is aware of, and advises the defendant

about, the breadth of mitigating material about the defendant that is available for use in the penalty phase.

Because the purpose of the penalty phase is to determine whether the individual defendant, having been found guilty, deserves to be put to death, the *nature* of mitigating evidence is fundamentally different from the evidence sought and developed for the guilt/innocence phase. The defense is entitled to present evidence for the purpose of humanizing and individualizing the defendant. In order to develop such evidence for possible presentation, defense counsel must develop a deeper understanding of the defendant's current life and life history than is usually necessary for the guilt/innocence phase. Moreover, in deciding what mitigating evidence to present, counsel must be sensitive to its tone and character.

In *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002), the state court had postulated that the defendant had no mitigation evidence to present, and therefore that the decision to present none had been strategic. The district court disagreed, pointing out that "Brownlee's counsel had not done any investigation into Brownlee's background or character, so they did not know what evidence there might have been to present." *Id.* at 1068. The Eleventh Circuit affirmed, observing: "counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence." *Id.* at 1070. It concluded that counsel's failure to conduct any mitigation investigation was inherently unreasonable because it deprived the defendant of his opportunity to humanize himself before the sentencer.

The Eleventh Circuit's reasoning is particularly instructive:

> [t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing

[on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence. In this case, counsel's absolute failure to investigate, obtain, or present any evidence, let alone the powerful, concrete, and specific mitigating evidence that was available, prevented the jurors from hearing anything at all about the defendant before them. An individualized sentence, as required by the law, was therefore impossible. Instead, the jury was asked to decide Virgil Brownlee's fate without hearing anything about his borderline mental retardation, his schizotypal personality disorder, his antisocial personality disorder, his many drug and alcohol dependencies, or his history of seizures.

Id. at 1074 (citations and quotations omitted). *See also Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 122 S. Ct. 2645 (2002); *Coleman v. Mitchell*, 268 F.3d 417, 449-51 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002); *Jermyn v. Horn*, 266 F.3d 257, 307-308 (3d Cir. 2001); *accord [Terry] Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) ("[T]here was no strategic decision at all because Shook was ignorant of various other mitigation strategies he could have employed.").[6]

6. Nor may counsel excuse inaction because they think the investigation would be fruitless. Counsel may not "sit idly by, thinking that investigation would be futile." *Voyles v. Watkins*, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial, on grounds that he "did not think that it would do any good," constituted ineffective assistance).

II. TO BE REASONABLE, AN INVESTIGATION OF MITIGATION EVIDENCE SHOULD BE COMPLETE AND THOROUGH.

An investigation that may be adequate for the guilt/innocence phase may be wholly inadequate for the penalty phase. *See, e.g., [Terry] Williams v. Taylor*, 529 U.S. 362, 395 ("We are likewise persuaded that the Virginia trial judge correctly applied both components of [the *Strickland*] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards – a judgment barely disputed by the State in its brief to this Court."). *See also Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002) (remanding for further evidentiary development, since the record reflected adequate investigation for the guilt phase but no investigation for the penalty phase).

The ABA has long stressed that investigation into mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Death Penalty Guidelines*, Guideline 11.4.1(C) ("Investigation"); *see also ABA Prosecution Function and Defense Function Standards*, Standard 4-4.1 ("Duty to Investigate") ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and *the penalty in the event of conviction*") (emphasis supplied)). By implication, these ABA policies encompass two aspects of investigation: (1) the breadth of the investigation (*where* counsel must research); and (2) the depth of the investigation (*how far* counsel must research in any particular area). In other words, the independent pretrial investigation into mitigation evidence must be both: (1) complete; and (2) thorough.

A. A Reasonable Mitigation Investigation Is Complete.

The areas of possible mitigation are numerous. They include any evidence that tends to lessen the defendant's moral culpability for the offense or would otherwise support a sentence less than death. *See Penry v. Lynaugh,* 492 U.S. 302, 327-28 (1989) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."); *Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Therefore, a reasonable independent pre-trial investigation into mitigation evidence should be "complete" in the sense that counsel should examine all areas where reasonable capital defense attorneys generally search for mitigation evidence *and* any other areas of which counsel are on special notice in their particular case.

The *ABA Death Penalty Guidelines,* adopted in 1989, discuss types of mitigation evidence that counsel should investigate, and sources of that evidence, both through examination of records and through interviews. Counsel should:

> collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Death Penalty Guidelines, Guideline 11.4.1(D)(2)(C) ("Investigation"). If it seems unnecessary for the ABA to set forth such a commonsense catalogue of areas of inquiry, only a brief perusal of actual "investigations" undertaken shows that it is, indeed, necessary. Counsel in the instant case did not make any effort to follow the guidance set forth in these *Guidelines.*

B. A Reasonable Mitigation Investigation Is Thorough.

Thorough investigation and planning for mitigation must begin immediately upon counsel's acceptance of representation. *See [Terry] Williams v. Taylor,* 529 U.S. 362, 395-396 (2000) (notwithstanding fact that trial counsel "competently handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); *ABA Death Penalty Guidelines,* Guideline 11.4.1 ("Investigation"); *ABA Prosecution Function and Defense Function Standards,* Standard 4-4.1(a) ("Duty to Investigate") ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

A perfunctory or *de minimis* investigation into one or all areas that a reasonable attorney would research does not satisfy the guarantees of the Sixth and Eighth Amendments. Lawyers, in consultation with their client, cannot make a valid strategic decision about the presentation of mitigating evidence without a reasonable understanding of *all* available mitigating evidence. Skimming through a capital defendant's psychosocial history or, as here, childhood social service records, does not provide the necessary depth of understanding to enable either the lawyers or the client to make informed strategic decisions.

Lawyers need to look reasonably deeply into each mitigation area they investigate (*e.g.* family, friends, co-workers, school records and medical records). Counsel cannot surrender simply because their first steps are frustrated, or because they find some information that they are unlikely to present. As this Court stated in *[Terry] Williams v. Taylor*:

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system – for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

529 U.S. at 396.

While this Court has upheld some decisions by counsel not to present mitigating evidence, the Court has premised

such findings on counsel's having made fully informed decisions. The Court has looked into the investigation and counsel's handling of the results of the investigation before finding reasonable the decision not to present the evidence that was found. *See Darden v. Wainwright*, 477 U.S. 168, 185 (1986) ("The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing."); *Burger v. Kemp*, 483 U.S. 776, 790 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interest would not be served by presenting this type of evidence."); *Bell v. Cone*, 535 U.S. 685, * * *; 122 S. Ct. 1843, 1853 (2002) (counsel utilized "what he believed to be the most compelling mitigating evidence in the case" extensively at trial and weighed the possibility of recalling witnesses or calling other witnesses in the penalty phase).

Sometimes, however, even a fully informed decision not to present mitigation evidence can be unreasonable. Once counsel are aware that the evidence exists, they must evaluate its potential benefit or harm by examining it and subjecting it to proper consideration. *See, e.g., Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) ("By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons' attorney's representation was ineffective."); *accord Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002), *cross-petitions for cert. filed* (Sept. 18, 2002) (No. 02-434); (Sept. 10, 2002) (No. 02-6265) ("Despite his conceded knowledge of this history, counsel failed to present any evidence of Karis's family abuse to the jury.").

C. A Complete and Thorough Mitigation Investigation Is Conducted by Counsel Independently and With the Assistance of Experts.

1. Counsel Should Conduct the Mitigation Investigation Independently.

Lawyers may not rely upon their own client for all of the available information that could be proffered to convince a jury to impose a sentence other than death. Nor may counsel fail to conduct an investigation because of the client's desire not to present mitigating evidence. *See, e.g., Carter v. Bell,* 218 F.3d 581, 596 (6th Cir. 2000) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors."); *Blanco v. Singletary,* 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *ABA Death Penalty Guidelines,* Guideline 11.4.1(C) ("Investigation") ("The investigation for preparation of sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.").

Counsel should never underestimate how much shame, embarrassment, and anguish certain mitigation evidence, such as childhood sexual abuse or other traumas, mental retardation or other developmental or mental disorders, causes defendants. The defendant may have repressed much of the information. In some cases, the defendant may not even comprehend the information. Even where a defendant is aware of the problem and can identify it, the defendant may have gone to great lengths to keep the information

hidden, and will be at best reluctant to divulge it to a lawyer. *See, e.g., Daniels v. O'Connor,* 243 So. 2d 144, 147 (Fla. 1971) (remarking that a mentally ill defendant "might mislead his counsel as to facts, misinform them as to his relations with other actors in the legal drama, and be utterly unreliable as a witness in his own behalf.") (quoting *State ex rel. Deeb v. Campbell,* 167 So. 805, 806 (Fla. 1936)).[7]

Many capital defendants have had prior experience with defense lawyers, and much of it has been bad, making these defendants even less forthcoming. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care,* 1993 U. Ill. L. Rev. 323, 338 (1993) ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. . . . [Thus,] a capital defendant . . . understandably will be reluctant to trust his attorney."). Finally, even if the defendant eventually is willing to share the information, this may not occur until much later in the representation, long after it will do the most good.

A history of physical, emotional, and sexual abuse, combined with neurological and psychiatric impairment, including mental retardation, is prevalent among defendants charged with violent crimes. *See, e.g.,* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 Santa Clara L. Rev. 547 (1995); Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States,* 143:7 Am. J. Psychiatry 838-45 (1986).

---

7. A defendant may, for example, go to great lengths to hide a developmental delay or mental retardation, but it is imperative that lawyers be aware of these limitations. *See, e.g.,* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L. Rev. 414, 484-86 (1985); *Atkins v. Virginia,* 536 U.S. 304, 350 (2002) (holding that mentally retarded defendants may not constitutionally be executed).

Moreover, many mentally ill defendants self-medicate with drugs and alcohol, which further compounds their condition. A defendant's perceptions and ability to communicate may be limited by substance abuse, mental illness, or developmental problems.

An additional danger is that counsel, who are untrained and unadvised in these areas, will not know when or to what extent such a limitation exists. Thus, what counsel do not see – and do not secure expert advice on – may limit the lawyers' ability to represent their client and may unreasonably restrict the scope of their investigation. Counsel must therefore rely on sources of information other than the client to obtain all potentially relevant mitigation evidence.

2. Counsel Should Conduct the Mitigation Investigation with the Assistance of Experts.

The duty to consult one or more experts is often of critical importance. Lawyers are not equipped to assess a person's intelligence or mental state, although a client's behavior might put them on notice that these factors are at issue. *See Hull v. Freeman*, 932 F.2d 159, 168 (3d Cir. 1991) ("[F]ew lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients."). A lawyer is an expert in the law, not in psychiatry, medicine, or social work. In addition to the special skills and training required to discover mitigation evidence, complex or apparently conflicting records may need to be explained to the decision-maker by one or more competent experts. *See ABA Death Penalty Guidelines*, Guideline 11.8.6 ("The Defense Case at the Sentencing Phase"). Further, as this Court has recognized, "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

It is important for defense counsel to secure expert advice for another reason: when the case is one in which the death penalty will be sought, the prosecution regularly calls experts. *See* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 24 (1998) (*"Federal Death Penalty Cases"*) (discussing federal death penalty cases), *available at* http://www.uscourts. gov/dpenalty/1COVER.htm (reporting that "both the prosecution and the defense rely more extensively on experts in death penalty cases" than in other criminal cases); *People v. Bell*, 505 N.E. 2d 365, 371 (Ill. App. 1987) (finding a lack of zealous representation where defense counsel did not seek an independent evaluation to counter the psychiatric report proffered by the prosecutor). The penalty phase, no less than a trial, is an adversary proceeding. Lawyers must be prepared to meet the prosecutor's evidence as well as plead on their client's behalf.

III. COUNSEL HAS AN ETHICAL OBLIGATION TO CONDUCT A REASONABLE INVESTIGATION INTO MITIGATION EVIDENCE.

The ethical obligation of a lawyer in a capital case with respect to mitigation matters is no different from the ethical obligation all lawyers have to premise informed strategic decision-making upon an investigation into the law and facts sufficient to make the decisions informed ones. This obligation is reflected in the ABA's Model Rules of Professional Conduct and every state's ethical code, which uniformly require complete and thorough investigation in order for a lawyer to provide competent and diligent counsel. *See* Model Rules of Prof'l Conduct R. 1.1 & R. 1.3 (2002); *see also* Peter A. Joy and Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493, 497 n.11 (2002).

All lawyers are bound by the obligations of the applicable rules of professional conduct. As this Court recognized in *Strickland*, the function of the ethical codes is to enforce counsel's adherence to their basic duties: loyalty, avoidance of conflicts of interest, advocacy, consultation and communication with the client, and skill and knowledge. 466 U.S. at 688. The Model Rules classify these duties as duties of competence, diligence, and communication. *See* Model Rules of Prof'l Conduct R. 1.1, 1.3, 1.4.

The Model Rules, like *Strickland*, employ a standard of reasonableness to assess a lawyer's behavior. Using "the skill and knowledge normally possessed by members of that profession or trade in good standing . . ." fulfills the duty of competence. Restatement (Third) of the Law Governing Lawyers § 52 cmt. b (2000) (quoting Restatement (Second) of Torts § 299A). A lawyer violates his duties of competence and diligence when he fails to prepare adequately and fails to inquire into or suitably evaluate the factual elements of the case before him. *See* Restatement (Third) of the Law Governing Lawyers § 16 cmt. d; § 52 cmt. c (2000); Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002).

When courts evaluate claims of attorney incompetence or lack of diligence, they look to two things: (1) what is at stake and (2) whether a lawyer reached a tactical decision based on the facts and the law, or whether he merely *surmised* that a particular course of action should be undertaken. *See* Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002) ("[M]ajor litigation . . . ordinarily require[s] more extensive treatment than matters of lesser complexity and consequence."); 4 Ronald E. Mallen & Jeffrey-M. Smith, Legal Malpractice § 30.27 at 528 (5th ed. 2000); *see also Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987).

Although the duties to be competent and diligent are distinct from the duty to communicate, a lawyer cannot fulfill the duty to communicate with his client if he has not first been competent and diligent. *See, e.g., Attorney Grievance Comm'n v. Zdravkovich*, 762 A.2d 950, 963-64

(Md. 2000) (failure to exercise diligence leading to the failure to keep the client reasonably informed). If lawyers do not conduct an adequate investigation into all potentially available areas of mitigation evidence that can be presented in the penalty phase, they will not have sufficient information to make informed decisions as to those decisions he will make; nor will the client have sufficient information to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Model Rules of Prof'l Conduct R. 1.4 cmt. 5 (2002).

The duty to communicate takes on added significance as the role of the client becomes more important to the decision-making process. That role is recognized in the rules of professional conduct that specifically address the allocation of responsibility between the lawyer and the client. As the Model Rules observe, "[the] client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Model Rules of Prof'l Conduct R. 1.2 cmt. 1 (2002). Thus, the ABA's ethical standards for the profession attach the same importance to full investigation and consultation with the client as is reflected in the constitutional jurisprudence of capital litigation.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Alfred P. Carlton, Jr.
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611-3038

OF COUNSEL:
Lawrence J. Fox
David J. Kessler
D. Alicia Hickok
Noreen P. Alvarado
Emily L. Mirsky
Robin M. Maher

American Bar Association

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

APPENDIX: GUIDELINE 11.3 – DETERMINING THAT DEATH PENALTY IS BEING SOUGHT

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while applying strategies to have the case designated by the prosecution as a non-capital one.

Commentary:

Jurisdictions may vary in how and when the prosecutor makes the determination of whether to request the death penalty. Jurisdictions vary significantly as to when the defense must be notified of the specific aggravating factors upon which the prosecution will rely in seeking the death penalty.[1] If there is any possibility that the death penalty will be sought, counsel should proceed as if it will be sought. As is set out in Guideline 11.4, early investigation is a necessity, and should not be put off on some possibility that the death penalty will not be requested, or that the request will be dropped at a later point.[2]

---

1. A list of cases from jurisdictions requiring specific aggravating factors to be disclosed prior to the guilt/innocence trial and from jurisdictions with no such requirement is found in *Williams v. State*, 445 So.2d 798, 804-05 (Miss. 1984) *cert. denied sub nom. Williams v. Mississippi*, 469 U.S. 1117; 105 S. Ct. 803; 83 L. Ed.2d 795 (1985). One of the cases cited is *Sireci v. State*, 399 So.2d 964 (Fla. 1981). In rejecting the defendant's claim that aggravating circumstances had to be listed in the indictment, the court said that "when one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death...," 399 So.2d at 970. *Sireci* has been cited in a later decision precluding the trial court from ruling prior to the guilt/innocence phase on the propriety of the case being pursued as a death penalty case, *State v. Bloom*, 497 So.2d 2, 3 (Fla. 1986).

2. California Attorneys for Criminal Justice & California Public Defenders Association, *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, Vol. 1, p. A-13 *et seq.* (1986), citing *inter alia Leo v. Superior Court*, 179 Cal. App. 3d 274; 225 Cal. Rptr. 15 (1986) review denied 6/20/86. In *Leo*, the court found no bar to the prosecution pursuing the death penalty despite having initially told the defense (almost four months earlier) that death would not be sought, so long as the case was still in the pretrial stage.

If required notice has not been given, counsel is "under no duty to invite a death penalty prosecution."[3] While preparing for a capital case when notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[4]

---

3. Dept. of Public Advocacy, *KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL*, p. 290 (1983).

4. *Id.*

APPENDIX: GUIDELINE 11.4.1 - INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty; and

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment.

As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, and special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision in the institution/education or training/clinical services); and religious and cultural influences;

D. seek necessary releases for securing confidential records relating to any of the relevant histories; and

E. obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death; and

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should attempt a prompt request to the police or investigative agency for any physical

evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions).

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; and

D. presentation of mitigation.

Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Act requests, to obtain all necessary information.

Commentary:

Counsel has a duty to investigate the case before recommending that a guilty plea be taken (or sought) or proceeding to trial.[1] This duty is intensified (as are many duties) by the unique nature of the death penalty[2] and is

---

1. *ABA Standards*, The Defense Function, Standards 4-4.1 and 4-6.1; NLADA, *Performance Guidelines For Criminal Defense Representation* (Draft Guideline 4.1).

2. *Strickland v. Washington*, 466 U.S. 668, 706; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984) (Brennan, J., dissenting in part, concurring in part).

broadened by the bifurcation of capital trials into two phases.[3]

The need for a standard mandating investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation. Inexperienced counsel – and even counsel experienced in non-capital cases – "may underestimate the importance of developing meaningful sources of mitigating evidence..."[4] *See* Guideline 11.8 and commentary.

Counsel's duty to investigate is not negated by the expressed desires of a client. Nor may counsel "sit idly by, thinking that investigation would be futile".[5] The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each.[6] Without investigation, counsel's evaluation and advice amount to little more than a guess.

Resources that counsel needs to pursue a proper investigation should be sought early in the case. The type and amount of assistance that can or will be made available aries from jurisdiction to jurisdiction; counsel should

3. *See* Streib, *Execution Under the Post-Furman Capital Punishment Statutes: the Halting Progress from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight"*, 15 Rutgers L. J. 443, 446 (1984).

4. Devine, *et al, Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 Rutgers L.J. 261, 293 (1984).

5. *Voyles v. Watkins*, 489 F. Supp. 901, 910 (N.D. Miss. 1980). *People v. Ledesma*, 43 Cal.3d 171, 200-204, 207-209, 221-223; 238 Cal. Rptr. 404; 729 P.2d 839 (1987).

6. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986), citing *inter alia Gray v. Lucas*, 677 F.2d 1986, 1093-1094 (5th Cir. 1982). Despite its recognition of the need for investigation, the *Thompson* court cited *Strickland v. Washington, supra*, n. 2, and declined to reverse where the attorney had failed to investigate the co-defendant's background, and had not contacted for sentencing purposes the psychiatrists who had previously examined the defendant.

demand on behalf of the client all necessary experts for preparation of both phases of trial.[7]

Individuals assisting in investigation should be within the confidences of the client and defense counsel, and should not be required to disclose information discovered during the investigation except at the direction of counsel.[8]

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but to try to prevent uncounselled confessions[9] or admissions:

> Don't forget, the defendant is a part of this team. From the initial interview forward[,] the bond you develop with the defendant is important in how you are able to handle the case. Your initial interview will often, by necessity, be hasty. Strongly admonish your client to talk or write to no one regarding the case. A former client of this author is sitting on death row in part because of devastatingly harmful letters that client wrote after the appointment of counsel. This admonition should be renewed regularly during trial, after conviction, and throughout the appellate process. In the event of a retrial, damaging post-trial statements may crucify your client.
>
> As soon as time permits arrange for an in-depth interview with your client with an eye toward both

7. The Supreme Court has recognized that indigent defendants are entitled to some forms of expert assistance, *see Ake v. Oklahoma*, 470 U.S. 68; 105 S. Ct. 1087; 84 L.Ed. 2d 53 (1985). Some states provide funds by statute for preparation of a capital case, *e.g.*, California Penal Code § 987.9.

8. The California statute providing funds for defense investigation in capital cases shields even the request for assistance from the prosecutor, Cal. Penal Code § 987.9; *see People v. Corenevsky*, 36 Cal.3d 307, 321; 204 Cal. Rptr. 165; 682 P.2d 360 (1984).

9. *See* Gradess, *The Road From Scottsboro*, Vol. 2, #2 *Criminal Justice* (Magazine of the ABA Section on Criminal Justice), p. 1, 45 (Summer 1987).

> developing the necessary trust and eliciting as many facts as you can to start you on the road to formulating your defense. . . [10]

Client interviews are vital for establishing the trust between attorney and client necessary to allow the attorney to learn the facts. Counsel cannot frame an adequate defense without knowing what is likely to develop at trial, including information that is or that appears to be incriminating.[11]

---

10. Indiana Public Defender Council, *INDIANA DEATH PENALTY DEFENSE MANUAL*, Vol. 1, p. 1.1-6 (1985).

11. *ABA Standards*, The Defense Function, Standard 4-3.2 commentary.

APPENDIX: GUIDELINE 11.8.3 - PREPARATION FOR THE SENTENCING PHASE

A. As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

B. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

D. If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself; and

4. witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

Commentary:

All commentary concerning sentencing is found after Guideline 11.8.6, the last Guideline in subsection 11.8.

APPENDIX: GUIDELINE 11.8.5 – THE PROSECUTOR'S CASE AT THE SENTENCING PHASE

A. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

Commentary:

All commentary concerning sentencing is found after Guideline 11.8.6, the last Guideline in subsection 11.8.

APPENDIX: GUIDELINE 11.8.6 - THE DEFENSE CASE AT THE SENTENCING PHASE

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

B. Among the topics counsel should consider presenting are:

1. medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2. educational history (including achievement, performance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3. military service, (including length and type of service, conduct and special training);

4. employment and training history (including skills and performance and barriers to employability);

5. family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religious influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct or supervision in institutions/education or training/clinical services);

6. rehabilitative potential of the client;

7. record of prior offenses (adult and juvenile), especially where there is no record, a short record or a record, of non-violent offenses; and

8. expert testimony concerning any of the above and the resulting impact on the client, relating to the

offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

Commentary:

Sentencing proceedings in a capital case resemble a separate trial more than they resemble non-capital sentencing proceedings.[1] The Constitutional due process right to present evidence, as well as the right to counsel, to confront the witnesses against the defendant, and to not be placed twice in jeopardy, adhere to capital sentencing proceedings.[2] Experienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial.[3]

---

1. *Bullington v. Missouri*, 451 U.S. 430, 438-446; 101 S. Ct. 1852; 68 L.Ed.2d 270 (1981).

2. *Id.; Specht v. Patterson*, 386 U.S. 605; 87 S. Ct. 1209; 18 L.Ed.2d 326 (1967); *Lockett v. Ohio*, 438 U.S. 586, 604; 98 S. Ct. 2945, 2981; 57 L.Ed.2d 973 (1978). There is, however, no constitutional right to have a jury decide the sentence, *Spanziano v. Florida* 468 U.S. 447; 104 S. Ct. 3154; 82 L.Ed.2d 340 (1984).

3. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 274 (1983), cited in Weinheimer and Millman, *Legal Issues Unique to the Penalty Trial*, The Champion, p. 33, reprinted in California Attorneys for Criminal Justice & California Public Defenders Association, *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, Vol. 11, p. H-14 (1986).

The evidence to be presented by the defense — indeed, the whole theory of the proceeding — at the sentencing phase stands outside normal criminal trial practice. Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail. The assistance of one or more experts (*e.g.*, social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome,[4] as set out in Guideline 11.4.1(A) and 11.4.1(7). Unless a plea bargain has resulted in a guarantee on the record that the death penalty will not be imposed, full preparation for a sentencing trial must be made in every case.

Counsel should consider contacting the victim's family concerning the sentencing phase. The 1987 Supplement to the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL* discussed the power of testimony by a victim's relatives that they do not want the defendant killed. It also discusses the fact that the legal basis for such testimony is not yet clearly established.[6]

---

4. Stebbins and Kenny, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial.* The Champion (Aug 1986) reprinted in *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3, Vol. 11, p. 87 H-37 *et seq.* (1987 Supp.).

5. Indiana Public Defender Council, *INDIANA DEATH PENALTY DEFENSE MANUAL*, Vol. 11, p. 6-1 (1985).

6. *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 4, Vol. 11, p. 87 H-89 (1987 Supp.); *see also Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), disallowing such testimony.

Roy Persons, whose wife Carol was murdered, said in a letter to the *St. Petersburg (Florida) Times* that he would have been "willing to testify in court that I or Carol would not have wanted (the defendant) to be sent to his death" but that his understanding was that such testimony "would not have been legal." Taken from "The Victims Speak", a pamphlet printed by the Institute for Southern Studies.

Along the same lines, counsel may consider seeking testimony from witnesses familiar with the actual process of an execution or having some expertise on the low deterrent value of capital punishment.[7] The legal basis for such testimony is also not yet clearly established.[8] But while counsel cannot be required to offer evidence held inadmissible by prevailing case law, counsel should consider whether such evidence might have value in a given case and whether (if it is barred by current case law in the jurisdiction) the question of admissibility should be preserved for appeal.

Obviously, the uniqueness of every client makes guidelines as to the sentencing phase a starting point, not a checklist.[9] However, counsel in every capital case should consider strategies offered by other attorneys, discussed in the literature or otherwise available for consideration. Counsel may not choose, without investigation and preparation, to sit back and do nothing at sentencing.[10] Even the client may not be able to mandate that counsel present no mitigation, for courts have found that public policy should not allow state-assisted suicide.[11]

---

7. Balske, New Strategies for The Defense of Capital Cases, 13 Akron Law Rev. 331, 358, 359 (1979) reprinted in the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3.

8. *People v. Harris*, 28 Cal.3d 935, 962; 171 Cal. Rptr. 679; 623 P.2d 240 (1981) (trial court properly excluded testimony about how the death penalty is carried out). *State v. Jenkins*, 15 Ohio St. 3d 164; 473 N.E.2d 264, 289 (1984) (testimony on non-deterrent value of the death penalty not admissible). *See* cases cited in Dept. of Public Advocacy, *KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL*, p. 328-333 (1983).

9. *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3, Vol. 11, p. H-4.

10. *Pickens v. Lockhart*, 714 F.2d 1455, 1467 (8th Cir. 1983).

11. *People v. Deere*, 41 Cal. 3d 353, 365; 222 Cal. Rptr. 13; 710 P.2d 925 (1985).

Because the scope of evidence admissible in mitigation is generally broader than that admissible in aggravation,[12] counsel may be seeking to adduce evidence of a type prohibited to the prosecution. Counsel should be prepared to object to inadmissible evidence proffered by the prosecutor. Counsel should also be prepared to object to information regarding the client that might be admissible in a non-capital sentencing proceeding but would constitute a denial of due process in the ratified atmosphere of a death penalty case.[13] Assertions that the client has engaged in unadjudicated criminal conduct have been held to deny due process in at least some death penalty cases,[14] while information regarding uncharged crimes may be admissible in the less formal sentencing proceedings occurring in non-capital cases.

The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill. The decision as to whether to have the client testify can be crucial. Especially if the client is not to testify for some strategic reason, counsel may consider having the client speak during the closing argument or to otherwise speak in the jury's presence.[15]

---

12. *See, e.g., Green v. Georgia*, 442 U.S. 95; 99 S. Ct. 2150; 60 L.Ed.2d 738 (1979) (hearsay offered by the defendant can come in where there were indicia of reliability, as a matter of due process).

13. The United States Supreme Court recently held that victim impact statements relating to the effect of a killing on the victim's family may not be used by the prosecution at the sentencing phase of a death penalty case. The Court specifically distinguished death cases from all others, *see Booth v. Maryland*, 482 U.S. 496 (1987); 107 S. Ct. 2529; 96 L.Ed.2d 440 (1987).

14. *State v. McCormick*, 22 Ind. 272; 397 N.E.2d 276 (1979); *but see Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984).

15. *See, e.g.*, Balske, *Putting It All Together: The Penalty-Phase Closing Argument*. The Champion, (March 1984) p. 47, reprinted in the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, *supra* n. 3, p. H-227.